SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 225

MONTELL R. MEACHAM, doing business as the "Barbary Coast,"

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California.

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THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal for the Second Appellate District of the State of California denying a petition for writ of review entered in the above entitled case on March 28, 1968.

Opinions Below.

There are no written opinions by the state courts below.

The order of the District Court of Appeal denying the writ of review, and of the California Supreme

Court denying a hearing thereon are set forth hereinafter as Appendix "A."

Jurisdiction.

1. The judgment of the District Court of appeal was made and entered on March 28, 1968.

2. No rehearing was sought in the court below and no extension sought in this Court within which to petition for certiorari.

3. The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari are 28 U.S.C. 1257(3) and Rule 19(I)(a) of the Rules of the United States Supreme Court.

Questions Presented.

1. Whether entertainment and dancing fall within the protection of the First Amendment to the United States Constitution.

2. Whether Sections 24200(a) of the California Business and Professions Code and Article XX, Section 22 of the California Constitution are unconstitutionally vague and indefinite on their face and as applied in this case.

3. Whether the respondent has denied the petitioner due process of law by suspending his license for acts which are not a violation of any statute, rule or regulation.

4. Whether the California courts have denied the petitioner due process of law by failing to give a judicial hearing on the question of whether petitioner's conduct is cause for a suspension of his license.

Constitutional Provisions Involved.

The First Amendment to the United States Constitution provides in pertinent part:

Congress ". . . shall make no law . . . abridging the freedom of speech, . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Constitution, Article XX, Section 22 provides in pertinent part:

> "The Department [of Alcoholic Beverage Control] shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals. . . ."

Statutes Involved.

1. Section 24200(a) of the California Business and Professions Code reads as follows:

> "The following are the grounds which constitute a basis for the suspension or revocation of licenses:
>
> a. When the continuance of a license would be contrary to public welfare or morals; but proceedings under this Section upon this ground are not a limitation upon the Department's authority to proceed under Article XX, Section 22 of the Constitution."

2. Section 23090 of the California Business and Professions Code is as follows:

> "Any person affected by a final order of the Board, including the Department, may, within the time limits specified in this section, apply to the Supreme Court or to the Court for the Appellate District in which the proceeding arose, for a writ of review of such final order. The application for writ of review shall be made within thirty days after filing of the final order of the Board."

Statement of the Case.

The petitioner herein is the holder of a license to sell beer issued by respondent Department of Alcoholic Beverage Control, State of California, and is and has been engaged in the business of operating a beer bar thereunder in the County of Los Angeles, State of California. Following the filing of an accusation by respondent against petitioner, and after an administrative hearing, respondent suspended petitioner's license on October 2, 1967. This suspension was based on findings that petitioner "did employ and use the services of" certain females, "and did permit and suffer the said females to tend bar and wait on patrons while attired in bikini pants with their breasts fully exposed to public view." Based on these facts, which are not disputed, the administrative hearing officer found that "grounds for suspension and revocation of such license exist and the continuance of such license would be contrary to public welfare and morals as set forth in Article XX, Section 22 of the State Constitution, and Section 24200(a) of the Business and Professions Code."

This decision of the administrative hearing officer was adopted by the respondent on October 2, 1967.

On February 14, 1968, following an appeal to the Alcoholic Beverage Control Appeals Board, said Board affirmed the decision of the respondent.

Petitioner filed a petition for writ of mandate in the California District Court of Appeal, Second Appellate District, pursuant to Business and Professions Code, Section 23090. The petition was denied by said Court without hearing and without opinion. Petitioner then petitioned to the Supreme Court of the State of California for hearing, which was denied without hearing and without opinion.

Stay of enforcement pending disposition of this petition has been applied for in this court, and granted.

How the Federal Questions Were Raised.

At the administrative hearing in the appeal before the Alcoholic Beverage Control Appeals Board, in the District Court of Appeal, and in the California Supreme Court, petitioner has in his briefs and petitions contended that dancing and entertainment are protected forms of expression under the First Amendment of the Federal Constitution, and that his rights to due process of law under the Fifth and Fourteenth Amendments thereof have been violated by the Attempted suspension of his license in the proceedings, being based on conduct which violates no law, statute or regulation.

REASONS FOR GRANTING THE WRIT AND ARGUMENTS AMPLIFING THE SAME.

I.

Entertainment and Dancing Are Forms of Expression Protected Under the First Amendment.

It is settled that the constitutional protection of freedom of expression includes not only the exposition of ideas, but entertainment and amusement as well.

Winters v. New York, 333 U.S. 507, 68 S. Ct. 668, 92 L. Ed. 840;

Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. (1966).

It is stated in *Winters,* that:

> "The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best literature."
>
> *Winters v. New York, supra,* 333 U.S. 507, 510.

Citing *Winters,* the California Supreme Court recently expressed that:

> "Also encompassed (within the right of freedom of speech and press) are amusement and entertainment."
>
> *Weaver v. Jordan, supra,* 64 Cal. 2d 235, 242.

Other local ordinances have also defined the mere use of "topless" barmaids as entertainment.

People v. Foley, Cr. A. 7278-7280 (1067) (Los Angeles Sup. Ct. App. Dept.);

People v. Kukkanen, Cr. A. 7217-7220 (transfer denied by C. A.) (1967) (Los Angeles Sup. Ct. App. Dep.);

Robins v. County of Los Angeles, 248 A.C.A. 611;

People v. Jordan, Cr. A. 6645 (Los Angeles Sup. Ct. App. Dept.).

In *Adams Newark Theater Co. v. City of Newark,* 120 A. 2d 496 (reversed on other grounds), the owner of a burlesque theater brought an action challenging the constitutionality of a city ordinance prohibiting certain types of performances. In considering this question, the Court remarked at page 498 that:

> "The rights guaranteed by the First Amendment and by our State Constitution are, beyond dispute, applicable to the commercial exhibition of plays and shows and the type of exhibition which the plaintiff herein staged, are shows in every sense of the word being so called burlesque shows."

This principle was reaffirmed in *City of Newark v. Humphries,* 228 A. 2d 550.

The mere fact that commercial activity is involved in the instant case ". . . is in itself, no justification for narrowing the protection of expression secured by the First Amendment."

Ginzburg v. U.S., 86 S. Ct. 942, 949; also see *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R. 2d 1412;

Smith v. People of the State of California, 361 U.S. 147, 4 L. Ed. 2205, 80 S. Ct. 215 (1959); *Weaver v. Jordan, supra.*

II.

Section 22, Article XX of the California Constitution Is Void for Vagueness as Applied Herein.

A. The Constitutional Requirement of Fair Warning Applies to Laws Regulating Conduct or Imposing Sanctions Upon Conduct.

The requirement that a statute be clear and definite is based upon two fundamental considerations:

(1) The statutes guide courts and administrative tribunals in the adjudication of various rights, duties and liabilities;

(2) They also serve as guides to the individual subject to them in planning their future conduct,[1]

1. As guides to adjudication, laws must be sufficiently definite to provide judges, juries and administrative tribunals with adequate standards for enforcing the legislative mandate uniformly and consistently in accordance with the legislative intent. *United States v. Petrillo*, 332 U.S. 1, 67; *Mahler v. Ebby*, 264 U.S. 32, 44 S. Ct. 457, 68 L. Ed. 549. A provisions of

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[1]For a discussion of these considerations see Note, Due Process Requirement of Definiteness In Statutes, 62 Harvard Law Review 77 (1948); Amsterdam, Note, 109 U. Pa. L. Rev. 67; *cf. United States v. Petrillo*, 332 U.S. 1, 7; *Musser v. Utah*, 333 U.S. 95, 68 S. Ct. 397, 92 L. Ed. 562.

law regulating the licensing and sale of alcoholic beverages, like any other, can be challenged on the ground that it provides neither the administrative authorities nor the courts with any reliable basis for determining what types of conduct are proscribed under the law and thus, improperly leaves the selection of prohibited acts to the caprice of administrative officials. *Seagram v. Hostetter,* 86 S. Ct. 1254, 384 U.S. 35, 16 L. Ed. 2d 336, 678 (reh. den.) (1966).

In considering a challenge for vagueness the Courts will generally go beyond the face of the statute alone.

> ". . . if the statute has been judicially construed, such construction of the statutory words become part of the statute 'as if it had been so amended by the legislature.'"
>
> *In re Davis, supra,* 244 A.C.A. 760, 51 Cal. Rptr. 702.

Additionally, further assistance may be derived from legislative history or an established common meaning, *In re Newbern, supra,* 53 Cal. 2d 786, 795, 3 Cal. Rptr. 364; *People v. McCaughan* (1957) 49 Cal. 2d 409, 317 P. 2d 974 or a requirement of specific intent. *Screws v. United States,* 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495; *Erlich v. Municipal Court,* 55 Cal. 2d 553, 11 Cal. Rptr. 758.

2. Although all statutes must guide adjudication, some must serve, in addition, to give guidance to individuals with respect to their future conduct. Many statutes, for example, require the performance or avoidance of specified acts. Elementary fairness requires that such acts be described in the statute with sufficient precision to give the individual adequate notice of what

conduct he must either perform or avoid, it is with respect to this function of statutes that the void-for-vagueness principle had its origin and with which it has been most often concerned. This is made clear by the Court's statement of the principle in *United States v. Harriss*, 347 U.S. 612, 98 L. Ed. 989, 74 S. Ct. 808 (1954).

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

Similarly, in *Connally v. General Construction Co.*, 269 U.S. 385, 46 S. Ct. 120, 70 L. Ed. 322, the Court declared:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men to common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In a multitude of other decisions, this Court has similarly stressed that the "constitutional requirement of definiteness" in a statute (*United States v. Harriss*,

supra, at 617) flows from the fact that it is the function of the statute to serve as a guide for conduct.[2]

This applies to statutes imposing civil sanctions as well as criminal statutes. See, *e.g., Small Co. v. American Sugar Refining Co.,* 267 U.S. 233, 45 S. Ct. 462, 69 L. Ed. 589 (1925); *Miller v. Strahl,* (1915) 239 U.S. 426, 36 S. Ct. 147, 60 L. Ed. 364; but *cf. Levy Leasing Co. v. Siegel,* 258 U.S. 242, 42 S. Ct. 289, 66 L. Ed. 595. There again, the Court has stressed that the invalidity of the statute challenged was a consequence of the fact that, through the enactment purported to establish a rule of conduct, it was too vague to give adequate guidance. Thus, in *Small Co. v. American Sugar Refining Co., supra,* the Court stated (267 U.S. at 239):

> "The defendant attempts to distinguish those cases (prior decisions of the Court holding criminal statutes invalid on grounds of vagueness) because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decision was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."

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[2] *Winters v. New York,* 333 U.S. 507, 515-520; *Boyce Motor Lines v. United States,* 342 U.S. 337, 72 S. Ct. 329, 96 L. Ed. 367; *United States v. Spector,* 343 U.S. 169, 72 S. Ct. 591, 96 L. Ed. 863 (1952); *United States v. Cardiff,* 344 U.S. 174, 73 S. Ct. 189, 97 L. Ed. 200 (1952); *United States v. Kahriger,* 345 U.S. 22, 78 S. Ct. 510, 97 L. Ed. 754 (1953); *Roth v. United States,* 354 U.S. 476, 1 L. Ed. 2d 3, 77 S. Ct. 1304 (1957).

B. The Scope of Term "Conduct Contrary to Public Welfare or Morals" as Applied by the California Courts.

In the recent case of *In re Davis,* 242 Cal. App. 2d 645, 51 Cal. Rptr. 702, the Court considered whether the phrase "outraging public decency" was void-for-vagueness. In an attempt to avoid a finding of uncertainty the Court there considered prior judicial construction, legislative history, established common law meaning, dictionary definitions and a requirement of specific intent. Failing to find adequate assistance in these areas, the Court declared that portion of Section 650½ Penal Code void unconstitutionally vague.

On its face the phrase "contrary to public welfare or morals" is at least as vague and indefinite as "outraging public decency." Also see *Giaccio v. State of Pennsylvania,* 382 U.S. 923, 85 S. Ct. 1558, 14 L. Ed. 2d 682 (1966) wherein the phrase "outrageous to morality and justice" was held void-for-vagueness. Contrary to these foregoing cases, the California courts have applied the term "contrary to public welfare or morals" to specific conduct on numerous occasions. Many of these cases have been pointed out by the respondent.

For example, in *Vallerga v. Department of Alcoholic Beverage Control,* 53 Cal. 2d 313, 1 Cal. Rptr. 494, certain licensees were charged with violating Section 24200 subdivision (e) of the Business and Professions Code in that they permitted licensed premises to be a resort for lesbians and homosexuals. Based on the reasoning of the Court in *Stoumen v. Reilly,* 37 Cal. 2d 713, 234 P. 2d 969, the Court held that Section 24200, subdivision (e) of the Business and Professions Code was unconstitutional. However, the Court indicated that

the evidence indicated some lewd acts or misconduct by homosexuals on the licensed premises and that the Department, if the licensee is otherwise accorded due process of law, may possibly charge the licensees with conduct contrary to public welfare or morals within the meaning of Section 22, Article XX of the Constitution. The Court noted that the conduct in question was similar to that found in the case of *Nickola v. Monro,* 162 Cal. App. 2d 449, 328 P. 2d 721 and *Kershaw v. Department of Alcoholic Beverage Control,* (1957) 155 Cal. App. 2d 544, 318 P. 2d 494 it was evident that on certain occasions male couples were seated at tables or booths at the licensed premises kissing or embracing each other or rubbing or grabbing the genitals and private parts of one another. This conduct was held to be, *inter alia,* contrary to public welfare and morals under Section 22, Article XX of the Constitution. *Adler v. Department of Alcoholic Beverage Control,* 174 Cal. App. 2d 256, 344 P. 2d 336 involved a taxi-dance bar where the evidence indicated that one taxi-dancer was rubbing her hands against the legs of patrons and touching a male patron in the public area asking him to go home with her and then performing a sexually suggestive dance act. One of the other dancers was demonstrating her peek-a-boo dress by exposing her breasts to an individual who happened to be an agent of the Department. These events taken as a whole were considered to support the findings of the Department that the licensed premises were permitted to be used for purposes injurious to public morals. It seems, therefore, in the *Adler* case the exposing of the breast was just an adjunct to other outlandish conduct by the taxi-dancers. *Jacques Incorporated v. State*

Board of Equalization, 155 Cal. App. 2d 446, 318 P. 2d 6 involved the exhibition of a lewd show and the permitting of lewd and obscene conduct on the licensed premises in violation of Section 311 of the Penal Code. This conduct was held to be contrary to public welfare and morals. Lewd and indecent acts between males on three different occasions were found in the case of *Morell v. Department of Alcoholic Beverage Control,* 204 Cal. App. 2d 504, 22 Cal. Rptr. 405. Violations of other laws not related to sex and lewd conduct have also been held to constitute conduct contrary to public welfare and morals. In *Mack v. Department of Alcoholic Beverage Control,* 178 Cal. App. 2d 149, it was found that bookmaking and gambling on licensed premises contrary to public morals. Similarly, the Court held in *MacFarlane v. Department of Alcoholic Beverage Control,* 51 Cal. 2d 84, 330 P. 2d 769, that where a licensee violated Penal Code Section 337 (bookmaking), this constituted conduct contrary to public welfare and morals. In *Cornell v. Reilly,* 127 Cal. App. 2d 178, a licensee violated Section 3030 of the Penal Code by permitting female employees to procure and encourage the sale of alcoholic beverages. This was also held to be contrary to public welfare or morals.

Finally, in *Mercurio v. Department of Alcoholic Beverage Control,* 144 Cal. App. 2d 626, 301 P. 2d 474, a licensee was charged with violating Rule 143 which forbids females from accepting alcoholic beverages on the licensed premises. As noted by the Court, "the rule was adopted to enable the board to exercise the powers conferred upon it by the Constitution." It was passed under the authority of Section 25750 of the Business and Professions Code. However, the licensee contended that its license could be revoked only for a violation of

a law and not of a board rule. In response to this contention the Court stated:

> "It is obvious that, as amended, the Constitution provides for revocation if the continuance of the license would be contrary to public welfare or morals, which includes violations of board rules as well as laws dealing with liquor establishments, and for violation of any laws prohibiting conduct involving moral turpitude. The latter would include laws not expressly dealing with liquor establishments."

The Court in *Mercurio* capsulized the application of the term "conduct contrary to public welfare or morals" to specific conduct. If the conduct violates a specific board rule or any laws dealing with liquor establishments or any laws prohibiting conduct involving moral turpitude, then that conduct is contrary to public welfare or morals. Rule 143 was determined constitutional and valid in *Mercurio* and the violation thereof was held to be contrary to public welfare or morals. A careful examination of the foregoing cases together with other cases applying the term "conduct contrary to public welfare or morals" indicates that all applications of Section 22, Article XX of the Constitution have fallen within the framework mentioned in *Mercurio*. These are the cases which have given some definition to a term which would otherwise be void-for-vagueness. It is submitted that in order to avoid the anti-vagueness of the United States Constitution, applications of the term "contrary to public welfare or morals" must clearly and unequivocally fall within that framework.

In *Stoumen v. Reilly*, 37 Cal. 2d 713, 234 P. 2d 969, an accusation charged a licensee with conducting a disorderly house and with selling alcoholic beverages to a minor. It was found by the hearing officer that the licensee "kept and permitted his licensed premises to be used as a disorderly house in that . . . persons of known homosexual tendencies patronized said premises and used said premises as a meeting place. . . ." and that beer bar was a "hangout" for homosexuals, that arrests were made for demonstrated homosexual actions by patrons but there were no convictions, and that there was no evidence of any illegal or immoral conduct on the premises or that the patrons resorted to the licensed premises for purposes injurious to public morals. The Court analogized this case *In re Farley*, 217 N.Y. 105, 111 N.E. 479 where it was held that a liquor license could not be revoked on the ground that prostitutes had dined in the licensee's restaurant, and *Patterson v. State*, 9 Okla. Cr. 564, 132 Pac. 693, 695 where a conviction of maintaining a bawdy house was not supported by evidence that women of loose or immoral character had obtained lodging in defendant's hotel. The court held that evidence was insufficient to support a finding that the licensee kept a disorderly house which was injurious to public morals. However, the Department contended that even if the evidence does not support the keeping of a disorderly house, it, nevertheless, indicates conduct contrary to public welfare or morals in violation of Section 22, Article XX of the Constitution. In response to this contention, the Court stated: "In order to establish good cause for suspension of plaintiff's license, something more must be shown than that many of his patrons were homosexuals

and that they used his restaurant and bar as a meeting place" In other cases where "something more" was shown and held to be contrary to public welfare or morals, the conduct amounted to a violation of Section 647, subsection a, of the Penal Code (lewd or dissolute conduct in a public place). See *e.g., Kershaw v. Department of Alcoholic Beverage Control, supra,* 155 Cal. App. 2d 544; *Adler v. Department of Alcoholic Beverage Control, supra,* 174 Cal. App. 2d 256.

III.

The Employment of "Topless Waitresses" in a Licensed Premises Is Not Violative of Any Law.

On several specified occasions petitioner permitted certain female employees to wait on patrons at his licensed premises while attired in a costume which fully bared said female employees' breasts to the view of patrons. There are no allegations of indecent exposure in violation of Section 314 (1) Penal Code or of lewd and dissolute conduct in a public place in violation of Section 647(a) Penal Code. It is charged in said accusation that such conduct, alone, without more, constitutes conduct contrary to public welfare and morals in violation of Article XX Section 22 of the Business and Professions Code.

It has recently been made abundantly clear that the mere display of naked female breasts in an establishment such as a bar, is not a violation of law. *In re Davis,* 242 Cal. App. 2d 645, 51 Cal. Rptr. 702. Also see *Robins v. County of Los Angeles,* 248 Cal. App. 2d 1. Furthermore, no rule or regulation has been promulgated by the Department of Alcoholic Beverage Control declaring that permitting a barmaid or waitress to

bare her breasts in an establishment licensed by the Department constitutes conduct contrary to public welfare and morals.

It is clear that the Department of Alcoholic Beverage Control has the authority to promulgate rules and regulations for the purpose of enforcing the Alcoholic Beverage Control Act, Article XX Section 22 of the California Constitution. Pursuant to said authority the Department has enacted certain rules and regulations contained in Chapter 1, Title 4 California Administrative Code. Moreover, Section 1 of said rules and regulations provide that:

> "Violation of any rule or regulation by a licensee, his agent or employee shall be deemed contrary to public welfare and morals and grounds for suspension or revocation of a license."

The basic minimum procedural requirements for the adoption, amendment or repeal of administrative rules and regulations are set forth in Section 11420 *et seq.* of the Government Code.

However, the Department asserts that it is not enforcing a rule or regulation in this case, but rather is acting under its constitutional power derived from Section 22, Article XX of the California Constitution empowering the Department of Alcoholic Beverage Control:

> ". . . in its discretion, to suspend or revoke any specific alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to public welfare or morals."

The phrase "contrary to public welfare or morals" is no less vague and indefinite than the term "outrag-

ing public decency" considered in the case of *In re Davis,* 242 Cal. App. 2d 645, 51 Cal. Rptr. 702. In holding that Penal Code Section 650½ was unconstitutionally vague and indefinite the Court in *Davis* first looked to judicial interpretation and legislative history and intent to see if some certainty could be given to the phrase "outraging public decency." See *Winters v. People of the State of New York,* 333 U.S. 514, 68 S. Ct. 665; *In re Newbern,* 53 Cal. 2d 786, 3 Cal. Rptr. 364.

A review of the authorities cited by respondent below indicates that in fact Section 22, Article XX of the California Constitution conduct contrary to public welfare or morals has been limited to the following situations: It is contrary to public welfare and morals to permit patrons or employees to conduct themselves on licensed premises in a lewd, dissolute or obscene manner, or present lewd or obscene exhibitions, to commit crimes on the licensed premises, or to violate any rule or regulation of the Department of Alcoholic Beverage Control or its predecessor, State Board of Equalization.

Further, in *Mercurio v. Department of Alcoholic Beverage Control,* 144 Cal. App. 2d 626, 301 P. 2d 474 the Court was confronted with the question as to whether a violation of a rule promulgated by the Department constituted a ground for disciplinary action. In response the Court stated:

> "It is obvious that, as amended, the Constitution provides for revocation if the continuance of the license would be contrary to public welfare or morals, which includes violation of Board rules as well as laws dealing with liquor establishments, and for violation of any law prohibiting conduct in-

volving moral turpitude. The latter would include laws not expressly dealing with liquor establishments."

California courts have intepreted conduct contrary to public welfare or morals only to include acts which violate the law (dealing with liquor establishments or involving moral turpitude) or which violate a Department rule or regulation. The mere use of "topless" waitresses in a licensed establishment is not violative of any law of this state. *In re Davis, supra,* 242 Cal. App. 2d 645, 51 Cal. Rptr. 702; *Robins v. County of Los Angeles,* 248 Cal. App. 2d. There is no evidence of lewd or obscene conduct by these waitresses. This conduct clearly falls outside the ambit of the phrase "conduct contrary to public welfare or morals" as interpreted and applied by the Courts. Admittedly, the Department has no rule or regulation proscribing the use of "topless" barmaids and employees. Absent a rule or regulation and without the assistance of prior application of the phrase "contrary to public welfare or morals" by our courts to the conduct in question, it is submitted that the Department's attempt to apply this phrase to the conduct in question is unconstitutionally vague and indefinite.

Section 25750 of the Business and Professions Code provides that:

> "Department shall make and prescribe such reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22 of Article XX of the Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that Section or by this Division . . ." (Emphasis added.)

Assuming *arguendo* that the Department has the power to promulgate a rule or regulation proscribing the use of "topless" barmaids and employees on licensed premises,[3] its failure to promulgate such a rule or regulation renders its action herein nugatory. The anti-vagueness proscription of the United States Constitution may have been avoided by the Department if it had enacted such a rule or regulation. This omission and the fact that the questioned conduct falls outside the ambit of prior construction and interpretation by our courts of the phrase "contrary to public welfare or morals" deprives petitioner of fair notice of acts to be avoided with respect to his conduct of licensed premises. The mandate of Section 25750 of the Business and Professions Code to the Department is clear. The Department shall make and prescribe such reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22, Article XX of the Constitution. Therefore, if the Department felt that it is the purpose and intent of Section 22 of Article XX of the Constitution to proscribe the use of "topless" barmaids or employees it should have promulgated a rule or regulation to that effect. The provisions of Section 22, Article XX of the Constitution are only self-executing if the licensee is otherwise accorded due process of law. *Vallerga v. Department of Alcoholic Beverage Control,* 53 Cal. 2d 313. 1 Cal. Rptr. 494. By ignoring the legislative mandate and Section 25750, Business and Professions Code, the Department has deprived petitioner of due process of law.

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[3]However, petitioner seriously questions such a rule or regulation in light of *Stoumen v. Reilly,* 37 Cal. 2d 713, 234 P. 2d 969.

In re Davis, supra, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702, considered the question as to whether a woman who exposes her bare breasts without suggestive movements before a limited group of adults of both sexes outrages public decency by any and all definitions of that term. In reversing convictions against defendants there, the Court declared that the term "outraging public decency" was unconstitutionally void-for-vagueness. Moreover, the mere use of "topless" waitresses in the licensed establishment is not violative of any other law of this state. *Robins v. County of Los Angeles,* 248 Cal. App. 2d 1. This accusation herein merely alleges that petitioner employed "topless" waitresses at his licensed establishment on specified dates. There is no evidence of lewd or obscene conduct by any of these waitresses. Morreover, there were no "suggestive" movements by these waitresses alleged or proven. In other words, neither petitioner nor his waitresses have violated any state law. The Department has passed no rule or regulation prohibiting the use of "topless" waitresses. Our Courts have not applied the term "contrary to public welfare or morals" to specific conduct which did not either violate a board rule, violate a law dealing with liquor establishments, or violate a law prohibiting conduct involving moral turpitude. The Department is not attempting to apply the phrase "contrary to public welfare or morals" to conduct which is not otherwise a crime or proscribed by a rule. It is petitioner's position that absent a rule or regulation and without the assistance of prior judicial construction of the phrase "contrary to public welfare or morals" to include the conduct in question, the Department's attempt to apply this phrase herein renders this phrase unconstitutionally

vague and indefinite. Moreover, for the reasons herinafter stated, the Department by not issuing a rule has failed to operate and proceed in the manner prescribed by law.

IV.

The Rule-Making Process Cannot Be Circumvented.

Prior to the 1954 Amendment of Section 22, Article XX of the Constitution, said Section read in pertinent part as follows:

> "The State Board of Equalization . . . shall have the power, *in its discretion,* to deny or revoke any specific liquor license if it shall determine for good cause the granting or continuance of such license would be contrary to public welfare or morals." (Emphasis added).

In 1954, said Section was amended to its present form to read in pertinent part as follows:

> "The Department of Alcoholic Beverage Control shall have the exclusive power, *except as herein provided and in accordance with the laws enacted by the Legislature,* . . . The Department shall have the power in its discretion to suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals. . . ."

This amendment must be read in conjunction with Section 25750 of the Business and Professions Code which provides in pertinent part, as follows:

> "The Department *shall make and prescribe such reasonable rules as may be necessary* or proper to carry out the purposes and intent of Section 22,

Article XX of the Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that Section or by this Division. . . ." (Emphasis added.)

The legislative mandate of the Department contained in Section 25750 is abundantly clear. The Department shall make and prescribe such reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22, Article XX of the Constitution. Judicial application of the term "contrary to public welfare or morals" as contained in Section 22, Article XX of the Constitution renders it unnecessary to pass a rule or regulation when the conduct violates laws dealing with liquor establishments or any law prohibiting conduct involving moral turpitude. See *Mercurio v. Department of Alcoholic Beverage Control, supra,* 144 Cal. App. 2d 626, 301 P. 2d 474. If the Department intends to prescribe conduct which it deems contrary to public welfare or morals outside of this area, it shall prescribe reasonable rules. Under these circumstances, it becomes necessary to prescribe such a rule to carry out the purposes and intent of said section and to accord a licensee due process of law. Any other interpretation of Section 25750 of the Business Code would nullify the purpose of this legislative act. Further, by its attempt to avoid the rulemaking process, the Department has failed to act in accordance with the laws enacted by the legislature, in violation of Section 22, Article XX of the California Constitution as amended in 1954.

V.

Petitioner Has Been Deprived of an Important Right Without a Judicial Hearing, Without Judicial Opinion or Findings, and Without the Right to Make Oral Argument.

The administrative hearing and administrative appeal below were followed by petition for writ of review filed in the District Court of Appeal, pursuant to Business and Professions Code Section 23090 as amended in 1967. This petition was summarily denied without hearing and without opinion. There followed a petition for hearing to the California Supreme Court which was also summarily denied without hearing and without opinion.

Prior to the amendment of the Business and Professions Code, Section 23090 in 1967, judicial review was sought in the Superior Court, where "petitioners usually bring administrative mandamus proceedings before the court on the merits by obtaining an alternative writ, which contains an order to show cause," or by noticed motion in the trial court. Deering, *California Administrative Mandamus,* California Continuing Education of the Bar, page 176. The elimination of the trial courts in the procedure on review of administrative mandamus in these cases creates a situation where, as a practical matter, licensees like petitioner are denied their day in court. The appeals courts, with their crowded calendars and custom of avoiding hearings in matters of original jurisdiction (3 Witkin, California Procedure, 2470, Extraordinary Writs, Section 8) will not give "the fullest opportunity for plenary" judicial review, such as this court has required in federal courts, on questions of constitutional rights. *Fay v. Noia,* N.Y. 1963, 83 S. Ct. 822, 372 U.S. 391, 9 L. Ed. 2d 837.

A liquor licensee is entitled to fair proceedings under the due process clause of the federal constitution; he is entitled to a decision which is not arbitrary or capricious, but which is based on substantial evidence which the applicant had full opportunity to refute. *Nimkoff v. Payne,* 93 U.S. App. D.C. 123, 210 F. 2d 689 (1953). An applicant for a license is entitled to an opportunity by notice for a hearing and answer as would constitute due process. *Goldsmith v. U.S. Board of Tax Appeals,* 270 U.S. 117, 123, 46 S. Ct. 215, 70 L. Ed. 494, 497 (1926).

Once a business is established pursuant to a license, property rights attach and the license cannot be suspended without procedural and substantive due process. *Jordan v. United Insurance Company of America,* 289 F. 2d 778, 10 U.S. App. D.C. 112 (1961).

In a number of cases, this court has recognized that certain substantial rights could not be affected without a judicial determination of certain facts. *Crowell v. Benson,* 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1932); *Ohio Valley Water Co. v. Ben Avon,* 253 U.S. 287, 40 S. Ct. 527, 64 L. Ed. 908 (1920); *Ng Fung Ho v. White,* 25 U.S. 276, 42 S. Ct. 492, 66 L. Ed. 938 (1922). Petitioner contends that he is entitled to a judicial determination of the questions raised in this proceeding, and that the record does not indicate that such a judicial determination has been given. No court has permitted the petitioner the right to put on evidence or to make oral argument; no court has issued an opinion or findings indicating any resolution of the constitutional problems raised. These are complex and important issues, and should not be relegated to the mechanical process of summary denial.

Conclusion.

This court has not heretofore passed on the issues presented herein. It is therefore urged that this Court grant the petition for certiorari.

Respectfully submitted,

McPherson Berrien E. Moore,
Ronald Steelman,
Attorneys for Petitioner.

APPENDIX "A."

Los Angeles, California, March 28, 1968

Meacham v. Department of Alcoholic Beverage Control. No. 32915.

Petition for Writ of Review Denied
Clay Robbins, Clerk
Court of Appeal, Second District
California State Building, Room 1201
Los Angeles, California

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
May 15, 1968

Dear Sir: I have this day filed Order HEARING DENIED.

In re: 2 Civil No. 32915, Meacham vs. Department of Alcoholic Beverage Control.

Respectfully

William I. Sullivan, Clerk

APPENDIX "B."

Opinion.

Before the Alcoholic Beverage Control Appeals Board of the State of California.

In the Matter of the Accusation Against Montell R. Meacham, Barbary Coast, 14320 South Western Avenue, Gardena, Los Angeles County, California, On-Sale beer license, Respondent, under the Alcoholic Beverage Control Act. AB-2976. File No. 64523. Reg. 2839.

In a decision issued by the Department of Alcoholic Beverage Control in accordance with the provisions of Government Code section 11517 (c), the Department of Alcoholic Beverage Control on October 2, 1967, found and determined that appellant used the services or "topless" waitresses and barmaids to serve beer in connection with the operation of the licensed premises, thereby establishing cause for discipline under section 24200(a) of the Alcoholic Beverage Control Act and article XX, section 22 of the California Constitution. A penalty of suspension of the license for 45 days with 15 days stayed upon conditions was imposed.

The department's decision contains the follows:

"FINDINGS OF FACT

"COUNT I

"1. It is true that on August 25, 1966, respondent licensee at and in the above-designated licensed premises did employ and use the services of a female, Carol Jean Johnson, and did permit and suffer the said female to tend bar and wait on

patrons while attired in bikini pants with her breasts fully exposed to public view.

"2. It is true that on September 29, 1966, respondent licensee at and in the above designated licensed premises, did employ and use the services of a female, Carol Jean Johnson, and did permit and suffer the said female to tend bar and wait on patrons while attired in bikini pants with her breasts fully exposed to public view.

"3. It is true that on October 6, 1966, respondent licensee at and in the above designated licensed premises, did employ and use the services of two females, Margie Gillispie and Josephine Flores, and did permit and suffer the said females to tend bar and wait on patrons while attired in bikini pants with their breasts fully exposed to public view.

"At the time respondent permitted his employees to perform their duties in attire which left their breasts fully exposed to public view, the respondent was aware that the Department of Alcoholic Beverage Control regarded such conduct as contrary to public welfare and morals.

"DETERMINATION OF ISSUES PRESENTED

"By reason of the foregoing facts set forth under Court I above, grounds for suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22 of the State Constitution, and Section 24200(a) of the Business and Professions Code.

"ORDER

"The license is suspended for 45 days with 15 days of said suspension stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made the Director of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed portion of the penalty; and that should no such determination be made, the stay shall become permanent."

The essential facts of the case are not in dispute since the matters alleged in subparagraphs 1, 2, and 3 of count I were stipulated as being true by both parties at the hearing conducted by the Office of Administrative Procedure on May 26, 1967. (R. T. 2.)

Appellant's appeal is based upon all statutory grounds. (Section 23084 Alcoholic Beverage Control Act.)

The question presented by this appeal is the authority of the department to proceed against a licensee, by means of an accusation, because the licensee employed "topless" waitresses to serve alcoholic beverages to patrons, this employment of "topless" barmaids not being contrary to any statute or department rule.

This appeals board has sustained the authority of the department to proceed against a licensee in such situations. (See especially Montell R. Meacham (doing business as Barbary Coast), AB-2648; Boreta Enterprises, Inc., AB-2519 and AB-2544; R&C Enterprises, Inc., AB-2614; Caskey, AB-2620; and Aguilera, AB-2631.)

Appellant maintains that the accusation is indefinite and uncertain and that no acts or omissions are charged except "acts contrary to public welfare or morals." This latter phrase, according to appellant, is so uncertain that an effective defense is impossible; in addition, appellant challenges the constitutionality of article XX, section 22 of the California Constitution and section 24200(a) of the Alcoholic Beverage Control Act.

In the Caskey case (AB-2620), we considered these same arguments and stated:

". . . Appellant makes the argument that the constitutional provisions granting the department the right to suspend or revoke a license upon the determination that 'continuance of such license would be contrary to public welfare or morals' is unconstitutionally vague and uncertain. Our attention has been directed to no case in which the validity of article xx, section 22 on this point has been presented. The authority of the department to proceed directly under this constitutional provision without alleging the violation of any specific statute or rule has been recognized. Thus in *Mack v. Dept. of Alcoholic Bev. Control,* 178 Cal. App. 2d 149, 2 Cal. Rptr. 629, relating to bookmaking activities on the licensed premises by the bartender, the department proceeded directly under the provisions of section 24200-(a) (public welfare and morals). The same was true in the cases of *Quilici v. Dept. of Alcoholic Bev. Control,* 178 Cal. App. 2d 549, 3 Cal. Rptr. 49; *Munro v. Alcoholic Bev. Control Appeals Bd. & Weiss,* 181 Cal. App. 2d 162, 5 Cal. Rptr. 527; and *Harris v. Alcoholic Bev. Control Appeals Bd. & Roundhouse,* 197 Cal. App. 2d 172, 17 Cal. Rptr. 315. While in each of these cases there was a penal statute prohibiting the

conduct involved, this distinction may not be as substantial as it first appears for the misconduct did not relate to the sale of alcoholic beverages and there is nothing in the Constitution, the Alcoholic Beverage Control Act, or the department rules that informs a licensee that he may be held responsible for the unlawful conduct of his employee in the absence of an allegation and a finding, supported by the evidence, that the licensee permitted said unlawful conduct.

"The case of *Vallerga v. Dept. of Alcoholic Bev. Control,* 53 Cal. 2d 313, 1 Cal. Rptr. 494, deals with this question to some extent. There the department had proceeded against the licensee under the provisions of section 24200(e) of the Alcoholic Beverage Control Act forbidding a licensee to permit his premises to become a '"resort" for . . . prostitutes, pimps, panderers or sexual perverts.' The Supreme Court held this statute to be unconstitutional as violative of the 'good cause' requirement of article XX, section 22. In the course of its opinion, the court stated:

> "'The foregoing is sufficient evidence of a display of sexual desires and urges which, when made in public place as a continuing course of conduct, could reasonable be found by the trier of fact to be "contrary to public welfare and morals." It is apparent in the present case, however, that the foregoing evidence was not relied upon by the finder of fact in arriving at the conclusion that continuance of the license would be contrary to public welfare or morals. . . .'
>
> * * *
>
> "'Section 22, article XX of our Constitution vests the Department of Alcoholic Beverage Con-

trol with authority to institute disciplinary proceedings against a licensee and to revoke his license upon determination "for good cause" that the continuance of such license would be "contrary to public welfare or morals." Nothing we have herein stated is to be construed as infringing upon such authority. . . .'

"In the recent United States Supreme Court case of *Seagram v. Hostetter,* 86 S. Ct. 1254, an attack was made upon the 'minimum price' provisions of the New York liquor control law upon the ground, among others, that the statutory definition of 'related person' was unconstitutionally vague. In dealing with this question, the court, in quoting from an earlier case, stated in part:

"'"... we think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or acertainable so as to survive challenge on the grounds of unconstitutionality." . . .'

(See also *Securities Comm. v. Chenery Corp.,* 332 U.S. 194.)

"The primary goal of the department in bringing disciplinary action against its licensees is to keep the regulated industry clean and wholesome. Where this is done by the application of a standard which is easily ascertainable and clearly understood by the industry, it is our opinion that the department has acted within its constitutional authority."

Appellant contends that the department has proceeded upon the authority of its policy manual prohibiting the use of "topless" waitresses, and this expression of policy

may not properly be used as a basis for discipline. We find no merit to this contention. The accusation and the decision of the department recite as authority for the department's proceeding, article XX, Section 22 of the Constitution and Section 24200(a), Alcoholic Beverage Control Act; the department's decision must stand or fall upon the authority of these provisions. Any reference to its policy manual could not save the decision. Nor can any expression in the policy manual defeat the department's authority to proceed if it has authority under the Constitution and statute. We have held that such authority is conferred by the Constitution and statute.

In the Boreta Enterprises, Inc. case, AB-2519, we stated as follows:

"The regulatory power of the Director must be exercised in such a manner as to take into consideration the welfare of the public as a whole in the light of the conditions that existed at the time of the hearing. (*Hasselbach v. Dept. of Alcoholic Bev. Control,* 167 Cal. App. 2d 662, 334 P. 2d 1058 (1959).) It is not unreasonable for the Director to determine that permitting waitresses, with their breasts exposed, to serve alcoholic beverages is incompatible with the public welfare and morals. Conditions under which alcoholic beverages may be dispensed are subject to state control (cf. *Seagram v. Hostetter,* 86 S. Ct. .... (1966) 34 U.S. Law Week 4355). Further, even children may come upon these premises since it is licensed as a bona fide public eating place. However, that need not be administratively significant here unless the Director deems to be so. Suffice to say that the Director may find that any warnings or notices given by the licensees to

prospective patrons to advise them of the manner in which alcoholic beverages are purveyed on the premises constitutes advertising and serves to encourage the intemperate use of alcoholic beverages, and tends to incite illegal activity. The Director may use common sense and practical understanding in relating the influence of the use of alcoholic beverages on human conduct to specific situations. He is not only empowered, but directed, to take preventive action to forestall such situations in connection with the sale of alcoholic beverages. The Director may properly decide that the threat of such contingencies establishes a basis for concluding that the continuance of a license under these circumstances would be contrary to public welfare and morals. (*Mercurio v. Dept. of Alcoholic Bev. Control,* 144 Cal. App. 2d 626, 301 P. 2d 474 (1956).) The Director may take such action permitted by the Constitution and the statute to enforce that decision. This raises the question whether the Director employed a procedure within his authority in deciding this case."

In answer to appellant's contention that the department's accusation is an unlawful restraint of freedom of expression, this board reiterates its previous statement on this issue. (See Boreta Enterprises, Inc., AB-2519.)

We said in that case that the guarantees of freedom of speech and expression in the Federal and State Constitutions do not limit the authority of the Director to suspend or revoke the license to sell alcoholic beverages if the licensee persists in selling alcoholic beverages by employing waitresses who serve such beverages with bared breasts.

The Department is legally vested with authority to regulate the highly sensitive alcoholic beverage industry. Where, as here, the department properly exercised the police power of the state by a procedure affording due process of law, there is no error.

In view of the foregoing, the decision of the department in the present proceeding is hereby affirmed.

Donald R. Wagner, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur: Robert I. Tuttle, Adrienne Sausset, Sacramento, California, February 14, 1968.

Filed February 21, 1968, Alcoholic Beverage Control Appeals Board.

SUPREME COURT, U. S.

JUL 24 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 225

MONTELL R. MEACHAM, dba the "Barbary Coast;"

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1967

No. ..... Misc.....

MONTELL R. MEACHAM, dba the "Barbary Coast,"

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

Respondent adopts the statement describing the decisions of the California courts as set forth in the Petition for Writ of Certiorari.

Jurisdiction.

The decision of the Court of Appeal of the Second Appellate District of California denying the Petition for Writ of Review was entered on March 28, 1968. The decision of the California Supreme Court denying a petition for hearing was entered on May 15, 1968. No

rehearing was sought in the court below and no extension sought within which to petition for certiorari. Petitioner believes that jurisdiction to review the judgment in question is conferred by 28 U.S.C. § 1257(3) and Rule 19(1)(a) of the Rules of the United States Supreme Court.

Statement of Questions Presented.

1. Does the following conduct, upon which suspension of petitioner's alcoholic beverage license was based, come within the scope of the First Amendment provisions respecting free speech: Petitioner operated a beer bar in which the women who tended bar and waited on patrons wore costumes which fully exposed their breasts to public view (colloquially known as "topless waitresses"). If such conduct is in the nature of speech protected by the First Amendment, does the California Department of Alcoholic Beverage Control have authority to determine that such conduct should not occur in a place where alcoholic beverages are sold and consumed?

2. Was it a violation of the due process clause of the Fourteenth Amendment for the Department of Alcoholic Beverage Control to suspend petitioner's license to sell alcoholic beverages on the ground that petitioner had engaged in conduct which was "contrary to public welfare or morals", as that phrase is used in Article XX, Section 22 of the Constitution of the State of California and as that phrase has been applied by the courts of the State of California?

3. Under California law does the Department of Alcoholic Beverage Control have authority to determine that conduct which does not violate any statute or rule of the Department is nevertheless contrary to public welfare or morals?

4. Was it a denial of due process for the Court of Appeal of the State of California to deny a Petition for Writ of Review without first requesting that a response be filed, without first inspecting the administrative record and without first providing the parties an opportunity to make oral argument?

Statement of the Case.

Respondent accepts the statement of the case contained in the Petition for Writ of Certiorari.

ARGUMENT.

I.

The Decision Suspending Petitioner's License Is Not in Violation of the Free Speech Clause of the First Amendment.

Under Roman numeral I petitioner argues that a writ of certiorari should be granted because "entertainment and dancing are forms of expression protected under the First Amendment." Whether or not the proposition stated in the petition is entirely correct, the argument is irrelevant because there is nothing in the record which indicates that the topless waitresses employed by petitioner were engaged in any form of entertainment or dancing. The unchallenged findings of the Department are that petitioner employed and used the services of females who tended bar and waited on patrons while attired in bikini pants with their breasts fully exposed to public view. These employees acted only in the capacity of waitresses, being set apart from ordinary waitresses only by the manner in which they were attired. The waitresses did not dance; they did not sing; they did not engage in any dramatic performance; and, petitioner has not cited to any part of the record which indicates that the waitresses were otherwise engaged in any form of entertainment. There is nothing in the record to indicate that petitioner was of the belief that he was communicating any ideas by employing topless waitresses or to indicate that the topless waitresses employed by petitioner believed they were engaged in the communication of any ideas.

> ". . . . No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct." *Roth v. United States,* 354 U.S. 476, 512 (1957). (Dissent by Mr. Justice Douglas.)

Even if the topless waitresses employed by petitioner were engaged in some form of expression, the State would still have authority to regulate or prohibit such expression in connection with its authority to regulate the sale and consumption of alcoholic beverages. *Cf. Konigsberg v. State Bar,* 366 U.S. 36, 50 (1961); *Prince v. Massachusetts,* 321 U.S. 158 (1944).

II.

The Provisions of Article XX, Section 22 of the California Constitution Authorizing the Department to Suspend Any Specific Alcoholic Beverage License if It Determines That Continuance of the License Would Be "Contrary to Public Welfare or Morals" Is a Delegation of Administrative Authority Which Is Sufficiently Specific to Satisfy the Requirements of Due Process.

In making his argument that Article XX, Section 22 of the California Constitution is void for vagueness petitioner relies in large part upon cases arising from criminal prosecutions, such as *United States v. Harriss,* 347 U.S. 612 (1954) and *Connally v. General Const. Co.,* 269 U.S. 385 (1926) or upon civil cases in which the standard of conduct sought to be applied was based upon the text of a criminal statute, such as *Small Co. v. Am. Sugar Ref. Co., 267* U.S. 233 (1925). However, the instant case does not involve a criminal proceeding nor does it involve the application of a legislative standard of conduct which would ever be applicable to a criminal proceeding. Thus, Article XX, Section 22 of the California Constitution is only required to have that degree of specificity required of statutes which delegate administrative authority.

It is established that statutes which merely delegate administrative authority need not have the degree of specificity required of statutes which define criminal offenses, since one of the principal purposes of the former type of statute is to create an area in which the administrative agency may exercise the discretion delegated to it by the Legislature. *American Power Co. v. S. E. C.*, 329 U.S. 90, 105 (1946) (in which the court upheld the commission's statutory authority to approve reorganization plans which would be "fair and equitable to the persons affected" but would not be "detrimental to the public interest or interests of investors" or would not lead to an "unfair or inequitable distribution of voting power".)

Moreover, as petitioner expressly recognizes, the meaning of the phrase "contrary to public welfare or morals" contained in the California Constitution must be determined in light of the State cases which have defined and interpreted it. *Musser v. Utah,* 333 U.S. 95, 97-98 (1948); *Cox v. New Hampshire,* 312 U.S. 569, 575-76 (1941). The constitutional phrase has been applied and interpreted in numerous appellate decisions, many of which are discussed by petitioner. In some of the cases discussed by petitioner the decision of the Department was upheld upon the ground that the conduct involved was contrary to public welfare or morals; in other cases discussed by petitioner the decision of the Department was reversed upon the ground that the conduct involved was not contrary to public welfare or morals. In none of the cases was the question of vagueness raised, from which it can be inferred that the phrase is well enough understood to be constitutionally certain and to permit the courts to apply the stand-

ards to specific cases as they arise. *Jordan v. De George,* 341 U.S. 223, 230 (1951).

The most pertinent of the cases in which the California courts have applied the phrase "contrary to public welfare or morals" is *Adler v. Dept. Alcoholic Bev. Control,* 174 Cal. App. 2d 256 (1959). In *Adler* the license was revoked on a finding that the licensee had violated section 25601 of the California Business and Professions Code. Section 25601 prohibited the use of any licensed premises as a ". . . disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety . . ." Cal. Bus. & Prof. Code § 25601. In affirming the decision of the Department the court summarized the evidence as follows:

> ". . . [O]ne taxi dancer rubbed her hands against the leg of a witness and then 'touching him in the pubic area' asked him to go home with her saying 'you can have ham and eggs or anything else you would like.' Another girl demonstrated her 'peek-a-boo' dress by exposing her breasts to a customer who happened to be an agent of respondent board. On another occasion the same taxi dancer illustrated the punch line of a story she was telling by pulling the upper part of her dress away from her body displaying her bosom. There was also evidence that sexually suggestive dancing occurred as charged. The evidence is substantial in character and supports the finding of the board that the licensed premises were permittted to be used for purposes injurious to public morals."
>
> *Adler v. Dept. Alcoholic Bev. Control, supra,* 174 Cal. App. 2d 256, 258 (1959).

A fortiori, if evidence that taxi dancers temporarily displayed their breasts on two occasions supports a decision that the premises were used for purposes injurious to public morals, the findings in the instant case that female barmaids wore costumes which completely exposed their breasts at all times supports the Department's conclusion that the premises were used in a manner contrary to public welfare or morals.

III.

The California Department of Alcoholic Beverage Control Has Authority to Determine That the Employment of Topless Waitresses in a Licensed Beer Bar Is Contrary to Public Welfare or Morals, Even Though Such Conduct Is Not Expressly Prohibited by Any Statute of the State of California or by Any Rule or Regulation of the Department.

Under Roman numerals III and IV of the Petition it is argued that the Department of Alcoholic Beverage Control could not prohibit the employment of topless waitresses without enacting a specific rule or regulation covering such conduct. However, the question raised is essentially one of State rather than Federal law. The question of whether the California Department of Alcoholic Beverage Control has acted within the scope of authority delegated to it by the People of the State of California is essentially one of State law and is not a question involving the United States Constitution. Indeed, nowhere in its argument under Roman numerals III and IV does petitioner point out any provision of the United States Constitution which might be pertinent to the instant case.

In any event, it is well settled under California law that the Department may suspend or revoke an alcoholic beverage license for conduct which is not otherwise prohibited by law or by rule of the Department. *Vallerga v. Dept. Alcoholic Bev. Control,* 53 Cal. 2d 313, 318-19 (1960); *Cornell v. Reilly,* 127 Cal. App. 2d 178, 185-86 (1954); *Moore v. State Board of Equalization,* 76 Cal. App. 2d 758 (1946). Of course, the decision of the California courts in the instant case also establishes that the Department was acting within the scope of authority granted to it by the State.

By way of analogy it is also established that a federal administrative agency may, in enforcing a general delegation of authority, prohibit or regulate conduct which is not otherwise prohibited by statute or by rule of the agency. *Securities Comm'n v. Chenery Corp.,* 332 U.S. 194, 202-03 (1947).

IV.

Petitioner Was Not Deprived of Judicial Review by the Proceedings Below.

Under Section 23090 of the California Business and Professions Code judicial review of a decision of the Department of Alcoholic Beverage Control is obtained by filing a Petition for Writ of Review in the Court of Appeal of the State of California. In the instant case petitioner filed such a petition and the petition was denied. The Court of Appeal did not ask the Department to file any written opposition to the petition nor did it ask the Department to file the administrative record with the court. Oral argument was not held prior to the denial of the petition. The Petition for Hearing in the California Supreme Court which followed was denied in the same manner.

Under Roman numeral V petitioner argues that the procedures followed in the State courts did not constitute a sufficient form of judicial review to meet the requirements of due process. This issue is being raised for the first time in the Petition for Writ of Certiorari; it was not raised by petitioner in his Petition for Writ of Review filed with the Court of Appeal of the State of California; nor was it raised in his Petition for Hearing filed subsequently with the Supreme Court of the State of California. In any event, it has been held that the procedure which was followed in the California courts is sufficient to constitute the judicial review required by due process and that the decision denying the Petition for Writ of Review is a decision on the merits affirming the decision of the Department of Alcoholic Beverage Control. See *Napa Valley Co. v. R. R. Comm.*, 251 U.S. 366, 371-73 (1920); *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630 (1954).

Conclusion.

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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